No. 87-1555

In The

Supreme Court of the United States

October Term, 1987

JAMES H. BURNLEY, et al.,

Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

RICHARD M. STEPHENS
Of Counsel
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 444-0154

RONALD A. ZUMBRUN
*ANTHONY T. CASO
*Counsel of Record
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 444-0154

Attorneys for Amicus Curiae, Pacific Legal Foundation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS–Continued

TABLE OF AUTHORITIES CITED

Page

CASES

TABLE OF AUTHORITIES CITED–Continued

TABLE OF AUTHORITES CITED–Continued

No. 87-1555

In The

Supreme Court of the United States

October Term, 1987

JAMES H. BURNLEY, et al.,

Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, et al.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS

Pursuant to Supreme Court Rule 36, Pacific Legal Foundation respectfully submits this amicus curiae brief in support of petitioners. Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt organization incorporated under the laws of California for the purpose of participating in litigation affecting the

public interest. Policy for the Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Foundation's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

Pacific Legal Foundation, its members, and supporters have a great interest in the safe operation of the transportation industry. Therefore, the Foundation supports reasonable measures to detect and prevent needless accidents risking human lives and wasting the efforts of human resources caused by drug and alcohol abuse. The testing program provided by the federal regulations challenged in this litigation is not only reasonable, but is also a responsible method of ensuring safety. Pacific Legal Foundation's public policy perspective and litigation experience will provide this Court with additional arguments relevant to the proper resolution of this matter.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 839 F.2d 575 (9th Cir. 1988).

STATEMENT OF THE CASE

The Federal Railroad Administration (FRA) adopted regulations which set forth a drug testing program for

railroad industry employees. Those regulations are codified in 49 C.F.R. § 219, *et seq.* (1986). Subpart C requires alcohol and drug testing by means of blood and urine analysis for all employees involved in certain train accidents. Those accidents include those involving either a fatality, release of hazardous material accompanied by an evacuation or injury, property damage of at least $500,000 or $50,000 if impact occurs, or a reportable injury (one affecting an employee's ability to work). Subpart D authorizes, but does not require, breath or urine tests when either a supervisor has a reasonable suspicion that an employee is under the influence of alcohol or drugs or an employee violates a railroad operating rule.

The respondents, Railway Labor Executives' Association (RLEA) and other railway labor organizations, filed suit in 1985 challenging these regulations as being violative of employees' Fourth Amendment rights to be free from unreasonable searches and seizures, Fifth Amendment rights to due process, equal protection, and privacy, and several statutory rights. The District Court granted summary judgment for the government on all grounds. The Ninth Circuit Court of Appeals reversed on the Fourth Amendment claim only and held that the regulations constitute an unreasonable interference with employees' reasonable expectations of privacy. The government filed a petition for certiorari which this Court granted on June 6, 1988.

SUMMARY OF ARGUMENT

As with administrative searches of closely regulated industries, a warrant is unnecessary for the drug and

alcohol tests required by the challenged regulations. The railroad industry is highly regulated in a manner which affects not only managers and owners, but also employees. Furthermore, a program of drug testing without a warrant is necessary to advance the governmental interest in safety. The regulations are rigid enough to protect employees from the whims of a supervisor's discretion.

Moreover, the testing program is reasonable. The employees' privacy interests are relatively slight. No non-incriminating evidence is obtainable through this program. The government interests, as government and as an employer, are great enough to justify a safety program similar to others used throughout the American work force. These regulations do not violate the Fourth Amendment.

ARGUMENT

I
THE FOURTH AMENDMENT DOES NOT REQUIRE A WARRANT TO BE ISSUED PRIOR TO CONDUCTING ANY OF THE DRUG TESTS REQUIRED OR AUTHORIZED BY THESE REGULATIONS

The Fourth Amendment proscribes *unreasonable* searches and seizures. One ensurer of reasonableness is the issuance of a specific warrant based upon probable cause by a neutral magistrate. Although such warrants are typical, as the Court of Appeals recognized, they are "not the *sine qua non* of reasonableness." 839 F.2d at 582.

The Court has not required a warrant in cases where "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985). These categories of cases where warrants and probable cause are not required include searches of students' personal effects by school officials, *id.*, searches of workers' desks by employers, *O'Connor v. Ortega*, 480 U.S. ___, 94 L. Ed. 2d 714 (1987), and administrative searches of closely regulated industries, *New York v. Burger*, 482 U.S. ___, 96 L. Ed. 2d 601 (1987). A more exhaustive list can be found in the Court of Appeals decision. 839 F.2d at 583 n.11.

A. Warrants Should Not Be Required Because the Drug Testing Program at Issue Is Similar to the Cases Involving Administrative Searches of Closely Regulated Industries

In *New York v. Burger*, 96 L. Ed. 2d 601, this Court held that a search of an automobile junkyard need not be preceded by a warrant based on probable cause or justified by any exception to the warrant requirement other than the administrative search of closely regulated industries. This Court upheld the warrantless police inspection and discovery of stolen automobiles. The reason is one's privacy expectations are attenuated by engaging in an industry with a history of pervasive government oversight. *Id.* at 612. When determining whether the automobile junkyard business was a "closely regulated industry," the Court relied on the fact that the persons engaged in the business must keep and make available to officials "'detailed records of purchases and sales.'" *Id.*

at 617 (quoting *People v. Tinneny*, 99 Misc. 2d 962, 969, 417 N.Y.S.2d 840, 845 (Sup. Ct. 1979)). That was the extent of regulation which the Court held justified a warrantless and unannounced inspection of the premises.

The railroad industry, however, is subject to much more extensive federal regulation and has been for decades. A whole title of the federal codes is devoted to regulation of railroads and FRA is a government agency involved in the same activity. Regardless of these facts, the Court of Appeals held that the extensive regulation applied only to railroad owners and managers and therefore could not be used to justify searches of employees.

This holding is inappropriate for several reasons. First, not all of the penalties for violations of regulations the Court of Appeals cited fall on the company as opposed to its employees. 839 F.2d at 585 n.12. *Persons* who fail to make complete reports can be held criminally liable. 45 U.S.C. § 431(e), *cited in* 839 F.2d 585 n.12.

Second, and more importantly, it is naive to believe that the extensive regulations have no effect on railroad employees merely because most of the penalties can only be assessed against the company. Surely, employees who cause violations of federal regulations must give an account of their actions or inaction to their supervisors, if not to federal authorities directly. Federal regulations have long affected the everyday lives of railroad workers.

Third, as noted by the dissent in the Court of Appeals below, many regulations and statutes are specifically directed toward railroad employees. 839 F.2d at 593 (Alarcon, J., dissenting). These include 45 U.S.C. § 62(a)(1), regulating the number of working hours,

49 C.F.R. §§ 218.1-218.30, 218.37, and 220.61, requiring certain safety procedures to be performed by employees, and 49 U.S.C. § 1801, providing criminal penalties for employees who knowingly transport hazardous activities.

Fourth, the history of the administrative search does not recognize any distinction between employers and employees or between management and labor. It is highly unlikely that the result in *New York v. Burger* would be any different if, when inspecting the automobile junkyard, the police found an employee, rather than the owner of the junkyard, in possession of stolen automobiles. An administrative search diminishes the expectation of privacy of all who work in the industry since the inspection takes place where employees work.

There is a subtle suggestion in the Court of Appeals' decision that the administrative search exception is based on implied consent when a business applies for a license and, since railroad employees are not licensed, the search cannot apply to them. 839 F.2d at 585. Although consent may have been implied in other administrative search cases, *New York v. Burger* should have laid to rest the notion that consent by obtaining a license is the underlying rationale. In *Burger*, the operator of the junkyard did not have a license or consent to the search. 96 L. Ed. 2d at 609. Since he did not obtain a license and yet the administrative search exception applied, a license as a type of consent to search cannot be a prerequisite for administrative searches. That railroad employees may not be licensed by the government is irrelevant to the application of the administrative search exception.

There is no reason to restrict the application of the administrative search exception to employers, rather than to employees. Employees' privacy interests are also attenuated because they work in the physical area being searched. The Court of Appeals inappropriately refused to extend the nature of the search allowed by this exception from searches of property to searches of persons. 839 F.2d at 584. Urine, blood, and breath testing is clearly not as intrusive as a pat down search, a strip search, or probably the most intrusive, a body cavity search. However, since drug testing involves an analysis of bodily fluids, there is an assumption that the search is highly intrusive. Although appealing at first glance, the assumption is wrong.

First, urine and blood tests have long been a part of routine physical examinations, as opposed to searches of homes and premises which are supposedly less intrusive, although not nearly as common. Second, and more importantly, blood, urine, and breath tests are a uniquely narrow scoped search. The obvious concern of the Fourth Amendment's requirement of reasonable expectation of privacy is that searches normally reveal many private and noncriminal aspects of one's life. One cannot search a home and not see private, legitimate information irrelevant to the object of the search, such as one's personal records, correspondence, reading material, and a host of personal effects. However, that is not the case with drug testing. The tests in this case are as if law enforcement officers could enter one's home with a filter over their eyes to block vision to every private aspect of one's life, except the object of the search. Unlike any other search, drug testing allows a search for the items sought without

revealing any legitimate activity irrelevant to the search. "Extending" the administrative search exception to drug testing from premises searches is an extension to a less intrusive search.

There can be no doubt that the railroad industry is one of the most highly regulated industries in the country and has been so for a long time. The pervasiveness of these regulations touch the everyday work life of railroad employees. Drug and alcohol testing reveals less about the private lives of the ones being tested than does a search of the premises where they work or live. The lack of obtaining a warrant should be justified under the rationale of the administrative search exception.

B. The Regulations Meet the Criteria for Application of the Administrative Search Exception to the Warrant Requirement

Although the railroad industry is closely regulated, that fact alone does not give the government *carte blanche* to conduct any type of search it wants. A search pursuant to this exception must exhibit three criteria:

> "First there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made.
>
> . . . .
>
> "Second, the warrantless inspections must be 'necessary to further [the] regulatory scheme.'
>
> . . . .
>
> " . . . '[T]he statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant.'" *New York v. Burger*,

96 L. Ed. 2d at 614 (quoting *Donovan v. Dewey*, 452 U.S. 594, 601-03 (1981)).

Each of these criteria are met in the present case.

1. The Governmental Interest Is Substantial

No one can seriously doubt that the government has a substantial interest in knowing whether railroad employees are using drugs or alcohol. Safety is the obvious substantial interest. As Judge Alarcon poignantly stated: "An idle locomotive, sitting in the roundhouse, is harmless. It becomes lethal when operated negligently by persons who are under the influence of alcohol or drugs." 839 F.2d at 593 (Alarcon, J., dissenting). "[L]ocomotives in the hands of drug or alcohol-impaired employees are the substantial equivalents of time-bombs endangering the lives of thousands." *Id.* at 596.

Accidents involving drug using railroad personnel may not be common, but they are catastrophic and needless. *See, e.g., Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Company*, 838 F.2d 1087 (9th Cir. 1988). There is nothing in the administrative search line of cases to suggest that any particular search be likely to produce evidence of wrongdoing. In fact, this Court in *South Dakota v. Opperman*, 428 U.S. 364, 378 (1976), recognized that searches may be justified by the severity of harm caused by failing to search, even though the likelihood of finding what is looked for during any particular search may be quite small. The deterrent effect of knowing a search can occur also should not be discounted.

Although evidence of drug and alcohol abuse acquired from these tests may be a small minority of those tested, the government interest is not insignificant

because those few who are impaired can cause catastrophic damage to life, limb, and property.

2. The Drug and Alcohol Testing Is Necessary to Further the Interest of Having Safe Operation of Railroads

There is no way to ensure that railroad personnel are not abusing drugs or alcohol other than by testing. Requiring reasonable, individualized suspicion of impairment is inappropriate for several reasons. Many employees may work without close supervision. The facts which give rise to "suspicion" are subject to quite varied interpretation. Testing based on such an amorphous standard could be subject to unfair overuse, underuse, and inconsistent application. Most importantly, drug impairment often does not carry any telltale signs as does alcohol impairment.

> "The drunken employee may exhibit the odor of alcohol on his breath, may have slurred speech or a stumbling gait . . . . But the use or abuse of marijuana and other illegal drugs frequently does not produce an externally obvious state of impairment. The intoxicating effect of these substances is said to be primarily mental or emotional; a user's judgment or clearheadness may be impaired without any obvious physical sign of intoxication. It is the insidious nature of these substances that too often the user's faculties are impaired and the damage done through a serious error on his part before he realizes that he is impaired and without any outward sign of his impairment that could lead a supervisor or other person to intervene." *Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad Company*, 802 F.2d 1016, 1020 (8th Cir. 1986).

Testing is the only reliable method to determine drug impairment.

Deterrence of drug and alcohol abuse affecting employees' abilities is another obvious purpose of the regulations. That purpose makes the testing particularly appropriate for the administrative search exception, since deterrence is a common purpose for such searches. *See United States v. Biswell*, 406 U.S. 311, 316 (1972).

3. The Testing Program's Certainty and Regularity Provide a Constitutionally Adequate Substitute for a Warrant

The regulations provide both certainty and regularity in several respects. Employees involved in certain types of accidents will be tested in a very specific manner. There is nothing left to the whim of a supervisor. The tests must take place as soon as possible after the accident. Qualified independent medical personnel are used. Since the procedures surrounding the tests are standardized, there is no likelihood that an employee will be subject to search at a supervisor's whim. That is the concern of the Fourth Amendment.

The requirement that the search be "certain" and "regular" does not mean periodic. The Court in *New York v. Burger* did not find it necessary to know why the junkyard was inspected on that particular day. 96 L. Ed. 2d at 609 n.2. Regularity is satisfied when the search occurs under circumscribing conditions, such as those which are required in the regulations presently at issue.

The regulations at issue meet the requirements for administrative searches in closely regulated industries. The rails are one of the most highly regulated industries in the country and many of the regulations directly affect employees in the industry. The testing is pursuant to the substantial governmental interest in safety and is the

only effective means to promote that interest. The regulations are pervasive enough to control the discretion of supervisors. It is unnecessary and frustrating to the safety objective to require a warrant prior to conducting drug tests.

II

THE REGULATIONS ARE REASONABLE

The bottom line requirement for all governmental searches is reasonableness. This requirement exists regardless of whether or not a warrant is required. A plurality of this Court articulated the process by which reasonableness is determined in *O'Connor v. Ortega*. "In the case of searches by a public employer, we must balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control and the efficient operation of the workplace." *Ortega*, 94 L. Ed. 2d at 724 (plurality opinion).

The balance in this case weighs in favor of the government's interest.

A. The Regulations Are Reasonable Because the Employees' Interests Are Relatively Minimal

On the employees' side of the balance, there are several privacy interests. One is to avoid the embarrassing process of providing a urine, blood, or breath sample in the first place. However, each type of these samples is a routine part of modern physical examinations. If a prospective employee cannot be required to provide a sample for this drug testing program, urinalysis unrelated to drugs as part of a physical examination, or even a physical examination itself, would be suspect as well.

The employees claim to have a privacy interest in the information obtained from the urine and blood itself. This is the primary argument that the tests reveal information about their private lives. Some have argued that urinalysis can reveal whether someone is pregnant, diabetic, or epileptic. However, the regulations do not authorize testing for pregnancy, diabetes, or epilepsy. It may be true that one *could* test for those characteristics, but this program does not do so.

Employees also have an interest in the accuracy of the tests, perhaps a due process interest. The Court of Appeals stated that drug testing literature is "replete with references to the unreliability of results." 839 F.2d at 589 (citing *Testing for Drug Use in the American Workplace: A Symposium*, 11 Nova L. Rev. (1987)). However, several courts have determined that combined use of the enzyme multiplied-immunoassay test (EMIT) and the gas chromatography/mass spectrometry (GC/MS) test is nearly 100% accurate. *See, e.g., Lovvorn v. City of Chattanooga*, 846 F.2d 1539 (6th Cir. 1988); *Rushton v. Nebraska Public Power District*, 653 F. Supp. 1510 (D. Neb. 1987), *aff'd*, 844 F.2d 562 (8th Cir. 1988); *Taylor v. O'Grady*, 669 F. Supp. 1422, 1430 (N.D. Ill. 1987); *Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad Company*, 802 F.2d at 1019; *American Federation of Government Employees v. Weinberger*, 651 F. Supp. 726, 729 (S.D. Ga. 1986).

The RLEA may also claim that employees have a privacy interest in not disclosing evidence of off duty drug use. The urine testing reveals drug use long after impairment. However, as Judge Alarcon noted in his dissent, employees are notified that, if they have used

drugs recently, they should have a blood test taken. *" 'The blood test will provide information pertinent to current impairment.'"* 839 F.2d at 597 (Alarcon, J., dissenting) (quoting 49 C.F.R. § 219.309(b) (2)) (emphasis by Judge Alarcon). The regulations provide an easy method whereby employees can protect whatever privacy interests there may be in off duty illegal drug use.

The employees' legitimate interests affected by these regulations are relatively small.

B. The Regulations Are Reasonable Because the Public Interest Is Substantial

There are two types of interests at stake here. One is the interest the government has in protecting the public interest. The other is the interest the government has as an employer. The public has a significant interest in ensuring that railway employees are drug free. The sheer power loosed in the movement of tons of cargo, and even toxic materials, is deserving of respect. Concern for lives of those in passenger trains should be paramount since the consequences of small mistakes can be catastrophic for even the most innocent of bystanders. The interest in preventing future accidents caused by drugs or alcohol is of the highest order.

The argument that one should be tested only if there is a reasonable suspicion from observation of drug impairment is practically unfeasible. One court recognized that drug use is undetectable by simple observation 95% of the time. *Schaill ex rel. Kross v. Tippecanoe County School Corporation*, 679 F. Supp. 833 (N.D. Ind. 1988).

A reasonable suspicion from mere observation also creates more problems that it purports to solve. One benefit of mandatory testing is that it does not involve some official's subjective discretion in deciding when and which employees should be tested. The Court recognized in *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976), that regularized checkpoints along highways which do not involve an official deciding at whim who and who not to stop are reasonable because of that fact. A reasonable suspicion requirement for urinalysis would only create a mechanism whereby the discretion of the one who decides who gets tested could result in unfairness. Testing of everyone involved in accidents as in this case is the most fair manner.

The plurality in *Ortega* recognized that government when acting as an employer is not as limited in its treatment of employees as in its treatment of the general public. "[T]he privacy interests of government employees in their place of work . . . while not insubstantial, are far less than those found at home or in some other contexts." *Ortega*, 94 L. Ed. 2d at 728 (plurality opinion).

All employers have some interests in having a drug free work force. One, some drugs have a long-term effect on people which decrease their productivity for all time, not just when "under the influence." United States Drug Enforcement Administration, *Drugs of Abuse* 37, 49 (1985). Hallucinogens can cause flashbacks which distort perception even after the drugs are eliminated from the body. *See Drugs of Abuse* at 49. Employers have an interest in not paying for employees who have a diminishing worth. Two, since many illegal drugs create a high susceptibility to addiction, employers have an interest in preventing

their employees from becoming worthless to the employer through addiction. *Id.* at 30-31. Three, employees who use illegal drugs on their own time are engaged in an illegal activity. Employers run the risk that an employee will be arrested and, therefore, be unavailable for work. Employees who use drugs are also more likely to abuse sick leave privileges. National Institute on Drug Abuse, *Developing an Occupational Drug Abuse Program* 10 (1985).

Although constitutional rights are not subject to the outcome of a commercial plebiscite, the increasing number of drug testing programs in the private sector is not insignificant. More than 25% of the Fortune 500 companies use some form of urinalysis drug testing for their employees. *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 172 (5th Cir. 1987). The increased use of drug testing in the private sector suggests that urinalysis for employees is an employment practice which society in general is recognizing as reasonable. Reasonableness is always a relative concept. It would be anomalous to declare a practice unreasonable which many employers and employees have voluntarily agreed to use in the private sector. The prevalence of drug testing in society suggests that society considers the concept to be reasonable. This is especially true in this case because the drug testing program is not for the purpose of enforcing criminal laws against employees generally. *See O'Halloran v. University of Washington*, 679 F. Supp. 997 (W.D. Wash. 1988).

The governmental interest in railroad safety is paramount. Additionally, the governmental interest in the "efficient operation of the work place" is substantial.

Ortega, 94 L. Ed. 2d at 724 (plurality opinion). Together these interests render the drug testing program reasonable.

CONCLUSION

The railroad is one of the most pervasively regulated industries in the country. These regulations even touch the everyday work of railroad employees. The drug and alcohol testing program should be free from the typical warrant requirement under the long-standing exception for administrative searches of closely regulated industries.

The drug and alcohol testing program is also reasonable. Although one's urine, blood, or breath is searched, nothing but the object of the search is revealed. That fact makes drug testing one of the least intrusive types of searches. On the other hand, the governmental interest in ensuring safety on the rails is extremely important. It is senseless to jeopardize human life by failing to detect drug and alcohol abusers who operate this nation's railroads.

Amicus respectfully urges this Court to reverse the erroneous decision of the Ninth Circuit Court of Appeals in this matter.

DATED: July, 1988.

Respectfully submitted

RICHARD M. STEPHENS
Of Counsel
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 444-0154

RONALD A. ZUMBRUN
*ANTHONY T. CASO
*Counsel of Record
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 444-0154

Attorneys for Amicus Curiae,
Pacific Legal Foundation